

STATE OF IOWA  
DEPARTMENT OF COMMERCE  
UTILITIES BOARD

IN RE:  U S WEST COMMUNICATIONS, INC., n/k/a QWEST CORPORATION, AND MCIMETRO ACCESS TRANSMISSION SERVICES, LLC	DOCKET NO. NIA-99-35
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**ORDER DENYING MOTION TO DISMISS APPLICATION FOR REVIEW OF  
NEGOTIATED COMMERCIAL AGREEMENT AND APPROVING  
INTERCONNECTION AGREEMENT**

(Issued October 29, 2004)

On August 2, 2004, MCImetro Access Transmission Services, LLC (MCI), filed an application with the Utilities Board (Board) requesting the Board approve an amendment to a negotiated interconnection agreement between MCI and Qwest Corporation, f/k/a U S West Communications, Inc. (Qwest), and a Qwest Platform Plus™ (QPP) Master Services Agreement between the two companies. The amendment would eliminate the unbundled network element platform (UNE-P) and would implement a batch hot cut process and discounts. The amendment is to an interconnection agreement between the two companies previously approved by the Board in Docket No. NIA-99-35.

The amendment filed by MCI is identical to an amendment filed for Board approval on July 27, 2004, by Qwest. No objections or comments were filed concerning the amendment and it was approved under the provisions of 199 IAC 38.7(4)"d" on September 6, 2004. Since the amendment has been

approved, it will not be addressed further, but instead was included here for informational purposes.

Pursuant to 199 IAC 38.7(4)"b," notice of the amendment and Master Services Agreement was published on the Board's Web site, providing for any comments or objections to be filed by September 1, 2004.

On August 16, 2004, Qwest filed a motion to dismiss the application, contending that the Master Services Agreement is not an interconnection agreement subject to Board review. Qwest argues that the Master Services Agreement does not fall within Section 252 of the Federal Telecommunications Act<sup>1</sup> and is therefore not subject to Board review or approval.

On August 26, 2004, AT&T Communications of the Midwest, Inc., and TCG Omaha, Inc. (collectively AT&T), filed comments related to the MCI application for approval. AT&T indicated that it does not oppose the two agreements, but disagrees with Qwest that the Master Services Agreement is not subject to Board review and approval.

On August 30, 2004, MCI filed a response to Qwest's motion to dismiss, noting that the services covered by the Master Services Agreement consist primarily of local switching and shared transport network elements in combination with certain other services. MCI argues that because the agreement creates an ongoing obligation pertaining to the manner in which Qwest will provide unbundled network elements, the parties have an obligation to file the agreement with the state

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<sup>1</sup> 47 U.S.C. § 252.

commission so that the state can determine whether the agreement discriminates against a telecommunications carrier not a party to the agreement and whether approval is consistent with the public interest, convenience, and necessity as described in 47 U.S.C. § 252(e)(2)(A).

On August 31, 2004, AT&T filed a response to Qwest's motion to dismiss. AT&T argues that the Master Services Agreement is an interconnection agreement adopted by negotiation that must be filed with the Board pursuant to Section 252 of the Federal Telecommunications Act.

The Board docketed the Master Services Agreement pursuant to 199 IAC 38.7(4), which provides that the Board will issue an order docketing a negotiated interconnection agreement within 40 days of the date of filing of the agreement if there are objections or comments filed. Although it appeared that there were no objections or comments concerning the substance of the Master Services Agreement, the Board docketed the application and agreements filed by MCI on August 2, 2004, to consider the issue raised by Qwest regarding the necessity of filing the agreement.

Because there were no disputed issues of fact, a hearing was not initially set and no party filed a request for a hearing. The Board established a date for filing briefs addressing the issue of whether the Master Services Agreement is a negotiated interconnection agreement required to be filed pursuant to 47 U.S.C. § 252.

On September 23, 2004, AT&T filed a letter indicating that it would not be filing a brief, but that its response to Qwest's motion to dismiss (filed August 31, 2004) incorporated its legal arguments regarding why the Master Services Agreement should be considered an amendment to the existing interconnection agreement and the need for it to be filed with the Board for approval pursuant to the 1996 Telecommunications Act.

On September 24, 2004, Qwest and MCI filed briefs. Supplemental filings were made on October 4, 2004 by MCI and AT&T, and on October 12, 2004, by AT&T to bring to the Board's attention orders issued by other state commissions on this issue and to a decision of the U.S. District Court for the Western District of Texas in *Sage Telecom, LP v. Public Utility Commission of Texas*.

The Federal Communications Commission (FCC) has issued at least one ruling that is relevant to this matter. On April 23, 2002, Qwest filed a petition for a declaratory ruling with the FCC seeking a ruling on the scope of the mandatory filing requirement set forth in 47 U.S.C. § 252(a)(1) of the 1996 Telecommunications Act (Act).<sup>2</sup> In its petition to the FCC, Qwest argued that under § 252(a)(1), a negotiated agreement should be filed for state commission approval only if it includes (i) a description of the service or network element being offered; (ii) the various options available to the requesting carrier and any binding contractual commitments

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<sup>2</sup> Qwest Communications International, Inc., *Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, WC Docket No. 02-89, Declaratory Ruling released October 4, 2002 (Declaratory Ruling).

regarding the quality or performance of the service or network element; and (iii) the rate structures and rate levels associated with each such option.<sup>3</sup>

Qwest argued in its petition to the FCC that agreements regarding elements that have been removed from the national list of elements subject to mandatory unbundling should not be required to be filed under § 252(a)(1). The FCC declined to establish an exhaustive, all-encompassing "interconnection agreement standard" and encouraged state commissions to decide in the first instance which agreements fall within the statutory standard.<sup>4</sup> However, the FCC found that agreements containing an ongoing obligation relating to Section 251(b) or (c) must be filed under Section 252(a)(1).<sup>5</sup>

The Master Services Agreement at issue in this docket contains a description of the service or element being offered (Service Exhibit 1, 1.1 General QPP™ Service Description); options available to the requesting carrier and performance quality commitments (Service Exhibit 1, 7.0 Performance Measures and Reporting, Performance Targets and Service Credits; also, Attachment A to Service Exhibit 1, Performance Targets for Qwest QPP Service); and rate structures and elements (Service Exhibit 1, 3.0 Rates and Charges). Thus, even based upon Qwest's argument in its FCC Petition, the Master Services Agreement meets the requirements for filing an agreement for approval by a State Commission.

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<sup>3</sup> Declaratory Ruling, ¶ 2.

<sup>4</sup> Declaratory Ruling, ¶ 10-11.

<sup>5</sup> Declaratory Ruling, fn. 26.

"Qwest argues that subsequent judicial decisions make it unnecessary to file this agreement." On August 21, 2003, the FCC issued its Triennial Review Order (TRO) pursuant to its statutory authority set forth at 47 U.S.C. § 251(d).<sup>6</sup> On March 2, 2004, the United States Court of Appeals for the District of Columbia Circuit issued its decision on the appeals taken from the TRO (the USTA II decision).<sup>7</sup> As a result of the D.C. Circuit's decision in USTA II, Qwest is no longer required to provide certain network elements under Sections 251 or 252 of the Act. According to Qwest, the Qwest Platform Plus<sup>TM</sup> services are now offered under Section 271 of the Act and consist primarily of the local switching and shared transport network elements in combination with certain other services. Qwest claims that because the agreement does not create any terms or conditions for services that Qwest must provide under Sections 251(b) and (c), it is not an interconnection agreement or an amendment to the existing interconnection agreement between Qwest and MCI and does not have to be filed with the Board.

The Board finds that the agreement between Qwest and MCI is subject to the filing requirements of 47 U.S.C. § 252(a)(1). Regardless of Qwest's obligations under the TRO and USTA II, the agreement between Qwest and MCI is a public contract that pertains to the obligations of 47 U.S.C. § 251. The agreement sets forth a description of services and elements to be offered; it contains performance

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<sup>6</sup> *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338 (TRO).

<sup>7</sup> *United State Telephone Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

measurements and obligations; and it contains rate structures and elements. Thus, § 252(a)(1) requires the agreement be filed with the Board for review and approval.

Qwest has argued that the FCC's Declaratory Ruling sets out unequivocally that only agreements that contain an ongoing obligation relating to § 251(b) or (c) must be filed under § 252(a)(1). However, the FCC also stated in its Declaratory Ruling that

...we believe that the state commissions should be responsible for applying in the first instance, the statutory interpretation we set forth today to the terms and conditions of specific agreements.<sup>8</sup>

The FCC declined to establish an exhaustive, all-encompassing interconnection agreement standard, leaving it to the state commissions to decide in the first instance whether a specific agreement should be filed under § 252.<sup>9</sup> The Board has considered positions of the parties to this docket and finds the agreement is required to be filed.

On March 12, 2004, the FCC issued a Notice of Apparent Liability for Forfeiture (NAL) against Qwest, in which the FCC fined Qwest for its failure to file certain interconnection agreements with state commissions as required by 47 U.S.C. § 252. In the NAL, the FCC interpreted its Declaratory Ruling of 2002 and reiterated that "on its face, § 252(a)(1) does not further limit the types of agreements that carriers must submit to state commissions."<sup>10</sup> In the NAL, the FCC stated that while

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<sup>8</sup> Declaratory Ruling, ¶ 7.

<sup>9</sup> Declaratory Ruling, ¶ 10.

<sup>10</sup> NAL ¶ 11, citing Declaratory Ruling ¶ 8.

§ 252(a)(1) is explicit in its filing requirements, the declaratory ruling provided certainty to those requirements by stating that any agreement creating an ongoing obligation and pertaining to the requirements of § 251 is an interconnection agreement that must be filed with the state commissions.<sup>11</sup>

The FCC stated that interconnection agreements must be filed with the state commissions so that Qwest's competitors are able to opt into these agreements. The FCC also concluded that § 252(a)(1) is not just a filing requirement but the first and strongest protection under the Act against discrimination by the incumbent local exchange carriers (ILEC) against its competitors.<sup>12</sup>

Whether an agreement must be filed under § 252 depends on whether the agreement is related to any of the obligations an ILEC has under § 251(b) and (c) to make its network available to competitors. The controlling factor is whether the agreement pertains to the obligations contained in § 251(b) or (c). The agreement between Qwest and MCI clearly pertains to the obligations Qwest has to open its network to its competitors under § 251 and, as a result, the agreement is a public agreement subject to the filing requirements of § 252. The dispositive issue is whether the agreement relates to Qwest's obligations under § 251, and the answer to that question is yes, so the agreement must be filed under § 252.

Pursuant to 47 U.S.C. § 252(e)(2)(A), the Board may reject a negotiated interconnection agreement or amendment if it finds either (1) the agreement or

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<sup>11</sup> NAL, ¶ 22.

<sup>12</sup> NAL, ¶¶ 31, 46.

amendment discriminates against a telecommunications carrier not a party to the agreement or (2) the implementation of the agreement or amendment is not consistent with the public interest, convenience, and necessity. As previously noted, no party filed any objections to the substance of the Qwest Platform Plus™ Master Services Agreement. Based upon the record made in this docket, the filed amendment does not discriminate against any other telecommunications carrier and is not inconsistent with the public interest and will be approved.

**IT IS THEREFORE ORDERED:**

1. The "Motion to Dismiss Application for Review of Negotiated Commercial Agreement" filed by Qwest Corporation on August 16, 2004, is denied.
2. The Qwest Platform Plus™ Master Services Agreement between Qwest Corporation and MCImetro Access Transmission Services, LLC, is approved to be effective upon the issuance of this order.

**UTILITIES BOARD**

/s/ Diane Munns

/s/ Mark O. Lambert

ATTEST:

/s/ Judi K. Cooper  
Executive Secretary

/s/ Elliott Smith

Dated at Des Moines, Iowa, this 29<sup>th</sup> day of October, 2004.